

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:12-CR-254 JCM (PAL)

Plaintiff(s),

ORDER

v.

ALBERT SILVA HERNANDEZ, JR.,

Defendant(s).

Presently before the court are numerous motions by defendant Albert Silva Hernandez, Jr.<sup>1</sup> Defendant has filed a petition for writ of error *coram nobis* (doc. # 78); and motions for appointment of counsel (doc. # 79); recusal of district judge (doc. # 80); prompt hearing (doc. # 81); conditional release pending review of motion (docs. ## 82, 89); and to hold imprisonment violative of the Eighth Amendment of the Constitution and grant equitable relief (doc. # 91). The government filed responses. (Docs. ## 84, 85, 90, 96). Defendant has not filed replies and the deadlines to do so have passed.

Also before the court is a remanded issue from the Ninth Circuit, asking this court to “consider in the first instance whether the distribution enhancement may be applied when the defendant does not distribute the image to a third party.” (Doc. # 93 at 3).

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<sup>1</sup> Hernandez filed each of the instant motions *pro se*. After filing his motions, attorneys Shari L. Kaufman and Amy B. Cleary filed notices of attorney appearance on behalf of Hernandez. Under Local Rule IA 10-6(a), “[a] party who has appeared by attorney cannot while so represented appear or act in the case. An attorney who has appeared for a party shall be recognized by the Court and all parties as having control of the client’s case.” Because Hernandez filed the instant motions when he was proceeding *pro se* and did not have any attorney of record, the court considers Hernandez’s motions properly filed on his own behalf.

## 1           **I.       Background**

2           On April 24, 2013, a jury convicted Hernandez of eight counts of sexual exploitation of a  
3 child. (Doc. # 46). This court sentenced Hernandez to 284 months per count to run concurrently  
4 and lifetime supervised release per count to run concurrently. (Doc. # 60). Hernandez timely  
5 appealed on August 14, 2013. (Doc. # 64).

6           On May 21, 2015, the Ninth Circuit Court of Appeals affirmed Hernandez's conviction,  
7 but remanded his case to the court to "consider in the first instance whether the distribution  
8 enhancement may be applied when the defendant does not distribute the image to a third party."  
9 (Doc. # 93 at 3).

## 10           **II.       Discussion**

### 11           A. *Defendant's petition for a writ of error coram nobis (doc. # 78)*

12           "*Coram nobis* is an extraordinary writ, used only to review errors of the most fundamental  
13 character." *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002). "The *coram nobis*  
14 writ allows a court to vacate its judgments 'for errors of fact . . . in those cases where the errors  
15 are of the most fundamental character, that is, such as rendered the proceeding itself invalid.'" *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987) (citing *United States v. Mayer*,  
16 235 U.S. 55, 69 (1914)).

17           To warrant *coram nobis* relief, a defendant "must establish that: (1) a more usual remedy  
18 is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse  
19 consequences exist from the conviction sufficient to satisfy the case or controversy requirement of  
20 Article III; and (4) the error is of a fundamental character." *Matus-Leva*, 287 F.3d at 760 (citing  
21 *Hirabayashi*, 828 F.2d at 604). "Because these requirements are conjunctive, failure to meet any  
22 one of them is fatal." *Id.* (citing *United States v. McClelland*, 941 F.2d 999, 1002 (9th Cir. 1991)).

23           "A person in custody may seek relief pursuant to 28 U.S.C. § 2255. Because the more  
24 usual remedy of a habeas petition is available, the writ of error *coram nobis* is not." *Matus-Leva*,  
25 287 F.3d at 761. Hernandez is in custody. Therefore, a motion under 28 U.S.C. § 2255, rather  
26 than the instant petition, is the appropriate method for Hernandez to lodge a collateral attack.  
27 Hernandez's petition is denied.  
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1                    *B. Defendant's motion for appointment of attorney (doc. # 79)*

2                    Hernandez requests an attorney to represent him under 18 U.S.C. § 3006A. (Doc. # 79).  
 3                    Shari L. Kaufman, Esq. and Amy B. Cleary, Esq. have filed notices of attorney appearance for  
 4                    Hernandez. (Docs. ## 94, 95). Accordingly, Hernandez's request for the court to appoint him an  
 5                    attorney is moot.

6                    *C. Defendant's motion for recusal of district judge (doc. # 80)*

7                    The court interprets defendant's motion for recusal as being brought pursuant to 28 U.S.C.  
 8                    § 455. Under § 455, the presiding judge determines whether recusal is warranted. *United States*  
 9                    *v. Azhocar*, 581 F.2d 735, 867–68 (9th Cir. 1978). § 455(a) is broad, requiring recusal “in any  
 10                    proceeding in which [a judge's] impartiality might reasonably be questioned.” 28 U.S.C. § 455(a);  
 11                    *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 860 n.8 (1988).

12                    Disqualification under § 455(a) is necessarily fact-driven and may turn on subtleties in the  
 13                    particular case. *Id.* Consequently, the analysis of each § 455(a) claim requires an “independent  
 14                    examination of the unique facts and circumstances of the particular claim at issue.” *Id.* (quoting  
 15                    *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999)); *see also Clemens v. U.S. Dist. Ct.*  
 16                    *for the Cent. Dist. of Cal.*, 428 F.3d 1175, 1178 (9th Cir. 2005).

17                    Recusal under § 455 is not unlimited—the source of any alleged bias must be extrajudicial.  
 18                    *Liteky v. United States*, 510 U.S. 540, 541 (1994). Judicial bias or prejudice formed during current  
 19                    or prior proceedings is insufficient for recusal unless the judge's actions “display a deep-seated  
 20                    favoritism or antagonism that would make fair judgment impossible.” *Id.*; *see Pesnell v. Arsenault*,  
 21                    543 F.3d 1038, 1044 (9th Cir. 2008). Thus, judicial rulings will support a motion for recusal only  
 22                    “in the rarest of circumstances.” *Liteky*, 510 U.S. at 555.

23                    Hernandez asserts that this court's “recusal is mandatory since he denied petitioner of due  
 24                    process.” (Doc. # 80 at 4). Hernandez asserts that the trial record demonstrates this court's “anger  
 25                    and hostility, disrespect for counsel, [and] simpathy [sic] for a perjurer who Judge Mahan either  
 26                    knew or should have known the witness (was lying under oath) and [Hernandez] has specifically  
 27                    asked for the Ninth Circuit to proceed toward Judge Mahan's Impeachment.” (*Id.* at 5).

1 A jury convicted defendant Hernandez and the Ninth Circuit has affirmed his conviction.  
 2 Hernandez does not make any specific claim as to how this court denied him due process or  
 3 exhibited hostility. *Liteky* instructs that, “judicial rulings alone almost never constitute a valid  
 4 basis for a bias or partiality motion.” *Liteky*, 510 U.S. at 556.

5 Further, “judicial remarks during the course of a trial that are critical or disapproving of,  
 6 or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality  
 7 challenge.” *Id.* Therefore, Hernandez’s assertion that the court was disrespectful and hostile  
 8 during the trial does not require this court to recuse itself.<sup>2</sup> Hernandez’s request for the Ninth  
 9 Circuit to “proceed toward Judge Mahan’s Impeachment” likewise does not require the recusal of  
 10 this court.

11 The court finds that recusal is neither justified nor necessary in this case. The court denies  
 12 Hernandez’s motion for recusal.

13 *D. Defendant’s motion for prompt hearing (doc. # 81)*

14 Hernandez moves for a prompt hearing regarding his motions for conditional release. The  
 15 court does not need to schedule a hearing regarding Hernandez’s motions for conditional release.  
 16 Accordingly, the court denies Hernandez’s motion for prompt hearing.

17 *E. Defendant’s motion for conditional release (doc. # 82)*

18 Hernandez requests that the court conditionally release him from custody pending review  
 19 of his petition for a writ of error *coram nobis*. The court denied Hernandez’s petition. Accordingly,  
 20 the court denies his motion for conditional release.

21 Further, even if the court construed Hernandez’s motion as a motion for release pending  
 22 appeal, the Ninth Circuit decided Hernandez’s appeal on May 26, 2015. Therefore, Hernandez’s  
 23 motion would be moot.

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 28 <sup>2</sup> Further, Hernandez does not support his assertion with any excerpts from the record.

1                   F. *Defendant's renewed motion for conditional release (doc. # 89)*

2                   Hernandez filed a renewed motion for conditional release. Hernandez attempts in many  
3 ways to reargue his case under the First Amendment and assert that he was improperly convicted  
4 by the jury. For the same reasons as discussed above, the court denies Hernandez's motion.

5                   G. *Defendant's motion to hold imprisonment violative of the Eighth Amendment*  
6                   *(doc. # 91)*

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8                   After defendant filed his motion to hold imprisonment violative of the Eighth Amendment,  
9 the Ninth Circuit affirmed his conviction. (Doc. # 93). However, the Ninth Circuit remanded the  
10 case to this court "to consider in the first instance whether the distribution enhancement may be  
11 applied when the defendant does not distribute the image to a third party." (*Id.* at 3).

12                  A district court may not entertain a habeas corpus petition until defendant's sentence is  
13 final and his opportunity for appellate review is foreclosed. *United States v. LaFromboise*, 427  
14 F.3d 680, 686 (9th Cir. 2005), *amended* No. 03-35853, 2005 WL 3312694 (9th Cir. Dec. 8, 2005)  
15 ("federal prisoners must exhaust appellate review prior to filing for habeas relief in the district  
16 court"); *see Feldman v. Henman*, 815 F.2d 1318, 1320-21 (9th Cir. 1987) (holding same).

17                  In the sentencing context, final means "a case in which a judgment of conviction has been  
18 rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or  
19 a petition for certiorari finally denied." *Id.* at 683 (citing *Griffith v. Kentucky*, 479 U.S. 314, 321  
20 n. 6 (1987)). "The reason for this rule is that 'disposition of the appeal may render the [habeas  
21 corpus writ] unnecessary.'" *Id.* (quoting *Black v. United States*, 269 F.2d 38, 41 (9th Cir. 1959)).

22                  The court declines to address Hernandez's motion at this time. Once Hernandez's  
23 conviction and sentence become final, he may bring a 28 U.S.C. § 2255 motion challenging the  
24 constitutionality of his confinement. *See Feldman*, 815 F.2d at 1320 ("[A] district court should  
25 not entertain a habeas corpus petition while there is an appeal pending in [the court of appeals] or  
26 in the Supreme Court.").

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1 *H. Remand issue*

2 The Ninth Circuit asks this court to “consider in the first instance whether the distribution  
3 enhancement may be applied when the defendant does not distribute the image to a third party.”  
4 (Doc. # 93 at 3). Accordingly, the court will hear argument regarding whether the distribution  
5 sentencing enhancement under U.S.S.G. § 2G2.1(b)(3) applies to Hernandez.

6 **III. Discussion**

7 Accordingly,

8 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Albert Silva  
9 Hernandez’s petition for writ of error *coram nobis*, (doc. # 78), be, and the same hereby is,  
10 DENIED.

11 IT IS FURTHER ORDERED that defendant’s motion for appointment of counsel, (doc. #  
12 79), be, and the same hereby is, DENIED as moot.

13 IT IS FURTHER ORDERED that defendant’s motion for recusal of district judge, (doc. #  
14 80), be, and the same hereby is, DENIED.

15 IT IS FURTHER ORDERED that defendant’s motion for prompt hearing, (doc. # 81), be,  
16 and the same hereby is, DENIED.

17 IT IS FURTHER ORDERED that defendant’s motions for conditional release pending  
18 review of motion, (docs. ## 82, 89), be, and the same hereby are, DENIED as moot.

19 IT IS FURTHER ORDERED that defendant’s motion to hold imprisonment violative of  
20 the Eighth Amendment of the Constitution and grant equitable relief, (doc. # 91), be, and the same  
21 hereby is, DENIED.

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1 IT IS FURTHER ORDERED that the court will hold a hearing to address the issue on  
2 remand on **Wednesday, August 19, 2015, at 10:00 A.M. in courtroom 6A.** Each party shall  
3 have up to Monday, August 17, 2015 at 12:00 PM to file a sentencing memorandum on the issue  
4 of whether the distribution enhancement under U.S.S.G. § 2G2.1(b)(3) applies to Hernandez.

5 DATED July 31, 2015.

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7 UNITED STATES DISTRICT JUDGE  
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